In the United States District Court for the Northern District of California, Southern Division

Civil No. 30561

UNITED STATES OF AMERICA, PLAINTIFF

v.

GROWER-SHIPPERS VEGETABLE ASSOCIATION OF CENTRAL CALIFORNIA ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on August 15, 1952. A petition for appeal is presented to the district court herewith, to wit, on October —, 1952.

OPINION BELOW

No opinion was rendered by the district court. The order of the district court is quoted in the statement, *infra*.

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JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this case is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *United States Gypsum Co.*, 333 U. S. 364.

United States v. *New Wrinkle*, 342 U. S. 371.

QUESTIONS PRESENTED

The complaint in a civil suit under Section 1 of the Sherman Act brought by the United States in May 1951 charged that a number of lettuce growers in California had entered into a "continuing agreement and concert of action" under which they agreed to restrict the amount of lettuce produced and harvested, and to formulate and carry out a plan for destruction of lettuce harvested prior to June 26, 1951. A preliminary injunction was issued to restrain the carrying out of the 1951 crop destruction program. In June 1952 the defendants moved to dismiss the case as moot on the ground that the complaint related solely to the 1951 crop destruction agreement which, by its terms, had terminated. The district

court granted the motion without opinion. The questions presented are:

1. Whether the complaint charged a continuing conspiracy, or one that related solely to the 1951 crop destruction agreement.

2. Whether, if the complaint did charge a continuing conspiracy, the Government was entitled to go to trial and have the opportunity to prove the existence of such conspiracy and the need for injunctive relief.

3. Assuming, *arguendo*, that the complaint related only to the 1951 crop destruction program, whether, in the light of the following, the court nonetheless erred in holding the cause to be moot:

(a) The crop destruction agreement had been adopted to deal with a recurring problem.

(b) Defendants had refused to state that they would not resume the challenged practices.

(c) Destruction of lettuce since the filing of the complaint had ceased only because of the preliminary injunction.

STATUTE INVOLVED

The pertinent provisions of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign

nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil antitrust suit under Section 1 of the Sherman Act brought by the United States in May 1951, against a number of lettuce growers in the Salinas area of California.[1] The complaint[2] charged that since March 1, 1951, the defendants had been engaged in an unlawful combination and conspiracy and had entered into unlawful contracts in unreasonable restraint of interstate commerce in lettuce; that such offense "is continuing and will continue further" unless declared illegal and enjoined by the court; and

[1] The complaint named the individual defendants both as individuals and as members and representative of the class of lettuce growers. The growers' trade association also was named as a defendant.

[2] A copy is attached hereto as Appendix A.

that the aforesaid "combination and conspiracy" has consisted of a "continuing agreement and concert of action among the defendants," the substantial terms of which were that the defendants agreed:

1. To restrict the amount of lettuce produced and harvested for sale and distribution in interstate commerce.

2. To formulate a plan to destroy lettuce planted by them prior to April 1, 1951, and to be harvested prior to June 26, 1951, in such quantities and at such times as a committee of defendants might determine, in order to prevent the selling price of the lettuce from falling below price-levels fixed by the committee.

3. To obtain the execution of written contracts embodying such crop-destruction plan by growers owning or controlling at least 85 percent of the lettuce acreage in the Salinas area planted prior to April 1, 1951, for harvesting prior to June 26, 1951.

The complaint charged that "in aid and furtherance of said combination and conspiracy" the defendants on April 23, 1951, having procured the execution of the contracts by growers owning or controlling the requisite 85 percent of the acreage, declared the crop-destruction plan effective.

The relief requested was that the defendants be enjoined, both temporarily and permanently, from destroying or failing to harvest or market

lettuce pursuant to any agreement or understanding, and from entering into any agreement to do so; from carrying out any of the practices, agreements and understandings charged; and from combining, conspiring or otherwise acting in concert with any person in the formation or effectuation of any other combination and conspiracy "of like character or effect." The complaint also requested the court to adjudicate that the defendants had combined and conspired to violate the Sherman Act, and that the agreement itself was illegal.

Attached to the complaint and made a part thereof was a copy of the written agreement. The agreement was titled "Proposal for Spring Stabilization Program of the Lettuce Industry." It recited that competition from other areas had caused serious losses to the industry in the past year, and that the business and community leaders believe that "unless some affirmative steps are taken by the lettuce industry to stabilize its position, further serious loss will result both to the industry and the economy of the Salinas-Watsonville area and have therefore requested that some plan be evolved to stabilize the industry." The agreement set forth the administrative machinery for conducting the proposed crop destruction plan. The plan was not to become effective unless growers owning 85 percent of the acreage planted prior to April 1 signed the agreements. A committee of growers was to be elected to have

charge of the program. Provision was made for the levying of assessments on the participants. The committee was empowered to order discing-up (destruction) of lettuce in such volume and at such time as it determined. Growers whose lettuce was thus destroyed were to receive payments out of the fund obtained through the assessments. The agreement provided that the plan applied to all lettuce planted prior to April 1, 1951, and harvested prior to June 16, 1951, or, if extended by the committee, June 26, and that "A new sign-up shall be necessary" to extend the period beyond June 16 or June 26, respectively.

The complaint was filed on May 18, 1951. On the same day an *ex parte* temporary restraining order was issued by District Judge Murphy. On May 28, 1951, Judge Murphy granted a preliminary injunction *pendente lite*.[3] In granting such injunction the court made findings of fact in substantially the same language as the allegations in the complaint. These included a finding that the defendants had engaged in a combination and conspiracy which consisted of a "continuing agreement and concert of action" to "curtail and restrict the amount of lettuce produced and harvested for sale and distribution in interstate commerce" (Fng. 8 (a)).

On June 30, 1952, during a hearing before District Judge Goodman on a Government motion

[3] The preliminary injunction subsequently was modified in aspects not relevant here.

relating to pretrial proceedings, the defendants raised the issue that the case was moot. They contended that the violations charged by the Government related solely to the contract for the 1951 season, and that such contract by its terms had expired. At the close of the argument defendants' counsel moved orally "to dismiss the action because it is moot on the face of the record and every paper in it" (Tr. of June 30, p. 31). Briefs were filed on the question of mootness, and further argument on the issue was held before Judge Goodman on August 13, 1952. On August 14, 1952, the court granted the motion to dismiss. The court wrote no opinion, but filed an order which stated:

> The motion of certain "named defendants" to dismiss the cause because of mootness is granted, "without prejudice to the right of the Government in the future to assail any actual contract or combination deemed to offend against the Anti-Trust Act." *United States* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466, at 478.

Dissolution of the preliminary injunction was suspended pending any appeal by the Government.

THE QUESTIONS ARE SUBSTANTIAL

I. Judge Goodman's dismissal of the complaint apparently was based upon his view that the Government's case related solely to the crop destruction contracts covering the 1951 season, and

that since the contracts had expired by their own terms, there no longer was any controversy before the court for adjudication. We submit, however, that the complaint charged a continuing conspiracy, and that the contracts relating to the 1951 crop destruction program were only one aspect of the over-all campaign "to restrict the amount of lettuce produced and harvested."

Since the court wrote no opinion the rationale of the decision must be gleaned from the judge's comments during the arguments on the motion to dismiss. They indicate that he viewed the Government's case as directed solely against the illegal crop destruction contracts.

Toward the close of the argument, the court stated that (Tr. of Aug. 13, 1952, part 2, p. 13):

> The whole cause of action here only operated with respect to a particular point in place of time and parties and having acted there is nothing more equity can do in that regard * * *.

Even the court's concern with the likelihood of defendants' future violations was directed to the possibility of new crop destruction agreements. Thus the court asked Government counsel (Tr. of Aug. 13, part 1, p. 37):

> Really the only question in the case is whether or not there is any evidence that the parties are going to enter into another disc-up agreement, isn't it?

Shortly thereafter the Court repeated this view (*Ibid.*, p. 38):

> The COURT. What is there so far to show that fact or the fact from which an inference may be drawn that the disc-up agreement will be again——
>
> Mr. TISBITS. That they will repeat this?
>
> The COURT. Yes.

Finally the court stated (Tr. of Aug. 13, part 2, p. 12):

> They may find some way to do this that is not repugnant to the statute. * * * The Court isn't going to supervise them. It is time enough for the Court to act when there is some judiciable [sic] controversy, something to act against.

We submit that this construction of the complaint by the district court was palpably erroneous. The complaint did not relate solely to the written agreements. It charged that the combination and conspiracy "is continuing and will continue further" unless enjoined by the court, and that the combination and conspiracy had consisted of a "continuing agreement and concert of action among the defendants" to restrict lettuce production. The contracts for the 1951 disc-up program were the method used by the defendants to deal with over-production of lettuce in that year. Their expiration did not mark the end of the larger conspiracy, but merely meant that further steps would be required to deal with the situation in subsequent years.

That the complaint charged a continuing conspiracy is also shown by the prayer for relief. The Government asked, *inter alia,* that the defendants be permanently enjoined from destroying or failing to harvest or market lettuce pursuant to any agreement or understanding, from entering into any agreement to do so, and from combining, conspiring or otherwise acting in concert with any person in the formation or effectuation of any other combination and conspiracy "of like character or effect." In other words, the Government framed the prayer for relief in the same broad terms as the conspiracy charged. If the complaint had related merely to the 1951 discing-up agreement, the Government presumably would have asked the Court only to declare the agreement illegal, and to enjoin the defendants from performing it or from entering into similar contracts in the future.

Moreover, the 1951 discing-up agreements themselves show that they were part of a larger overall program of crop limitation. The agreement was titled "Proposal for Spring Stabilization Program of the Lettuce Industry." It recited the necessity that "some plan be evolved to stabilize the industry" to avoid "further serious loss" to both the industry and the economy of the area. Obviously, these references were not just to the over-production occurring in the spring of 1951, but to the larger problem of

stabilizing the industry generally. The record shows that oversupply and consequent price drops in May and June have been a recurrent problem in the Salinas area because of the large volume of lettuce that ripens at that time.[4]

The growers previously had endeavored to obtain a state marketing order under which a crop destruction program could have been conducted, but had been unable to obtain approval of the necessary percentage of growers in other lettuce areas.[5] While the particular crop destruction program adopted in the spring of 1951 naturally related to the immediate problem then confronting the growers—discing-up in May and June—the record before the court indicates that the 1951 agreement was but a part of the overall "stabilization program" which the complaint alleged.

2. Since the complaint clearly alleged a continuing conspiracy, and not just one "with respect to a particular point in place of time and parties", the Government was entitled to go to trial and have an opportunity to prove that allegation. The Government also was entitled to

[4] Since defendants' motion to dismiss was made "on the face of the record and every paper in it," which included affidavits, admissions, etc., the motion must be treated as one for summary judgment which searches the entire record.

[5] Under California law, a state marketing order of the type sought by defendants requires the approval of a stated percentage of all the growers in the state, not just those in a particular area. Deering's California Codes, Ag. C. A. # 1300.16 (a) (2), 1300.18.

show that there was a reasonable likelihood of further violations unless enjoined by the court. *United States* v. *Hart-Carter Co.*, 63 F. Supp. 982 (D. Minn.) [6]

This is not a case where a court refuses an injunction after receiving evidence because it is of the view that there is no likelihood that the illegal practices will be repeated. Cf. *United States* v. *Hart-Carter Co., supra.* In such a situation, the issuance of injunctive relief is a matter largely within the discretion of the district court, *Walling* v. *Youngermah-Reynolds Hardwood Co.*, 325 U. S. 419. Here, however, the court's dismissal of the case resulted from an erroneous construction of the complaint.

Even if the court had been of the view that no further discing-up agreements were likely to be executed—a conclusion we deem contrary to the evidence (see *supra*)—this would not indicate

[6] In that case a complaint under Sections 1 and 2 of the Sherman Act had charged a continuing conspiracy between the defendant and a British concern to restrain and monopolize commerce in grain disc separators. Prior to trial the defendants moved for summary judgment on the ground that the controversy was moot because the alleged conspiracy was based on a contract between the two companies that had been terminated before the suit had been filed. The court denied the motion on the ground that since the Government had charged a continuing conspiracy and that the defendants would continue the illegal practices unless enjoined, there were issues of fact not determinable on a motion for summary judgment. After trial, however, the court refused to issue an injunction, since in its view there was no reasonable possibility that the illegal acts would be repeated.

that there was no reasonable likelihood that additional steps might be taken in furtherance of the continuing conspiracy to restrict lettuce production which was charged in the complaint.

United States v. *Hamburg-American Steamship Company*, 239 U. S. 466, cited by the district court in its order granting the motion to dismiss,[7] does not support the dismissal of the complaint. That case merely held that where violations of the Sherman Act were grounded upon an illegal contract, the intervention of war which made performance of the contract impossible rendered the case moot.[8] The complaint did not charge a continuing conspiracy, as in the instant case, but merely that the defendants had entered into an "unlawful combination and conspiracy" "in and by the execution of an unlawful contract," pursuant to which other illegal acts were committed (Record on Appeal, United States Supreme Court, Nos. 289 and 332, Oct. Term 1915, Volume 11, pp. 19–20). Where the conspiracy relates to a continuing course of conduct, however, the case is not mooted merely by abandonment of particular practices used in carrying out the pro-

[7] The citation was to page 478, where the Supreme Court used the language relating to dismissal without prejudice which the district court quoted in its order granting the motion to dismiss. The case, however, is one of the leading authorities on dismissal for mootness.

[8] Accord: *United States* v. *National Lead Co.*, 63 F. Supp. 513 (S. D. N. Y.), affirmed 332 U. S. 319; *United States* v. *Alkali Export Ass'n.*, 86 F. Supp. 59 (S. D. N. Y.).

gram. *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290.

The practical effect of the decision below is to preclude the Government from proving the existence of a continuing conspiracy charged in the complaint—with the concomitant right to injunctive relief—merely because certain means used in its effectuation have become inoperative. The problem is particularly significant in antitrust cases dealing with restraints on agricultural production. In such cases, the complaint often necessarily refers to restraints imposed in one particular year.[9] If, however, inclusion of such references may convert the complaint into a charge against only the specific methods thus detailed, the Government will be denied relief in

[9] Cases are often brought relatively soon after the restraints have become operative, and allegations of actual restraint can only refer to that year. Furthermore, if the complaint is filed while an actual crop destruction program is in operation—as in the instant case—the case can rarely be tried before the brief harvest period has expired.

In the instant case, for example, the temporary injunction stopped the discing-up program during its operation in 1951, and prevented it from being put into operation in 1952. If the stay is dissolved, however, the defendants will be free to resume crop destruction in 1953, and thereby artificially raise lettuce prices. It is no answer to say—as the court's decision implies—that since dismissal of the complaint was without prejudice to the Government's right in the future "to assail any actual contract or combination deemed to offend against the antitrust Act," the Government can institute another suit against future violations. The Government should not be required to bring a series of protracted lawsuits to dissipate the effects of a single conspiracy.

many cases where particular restraints under a continuing conspiracy have been concluded by the time the matter comes on for trial. Such a result would seriously impede effective enforcement of the antitrust laws.

3. But even if the complaint could properly be construed as charging conspiracy relating only to the dicing-up agreement (we do not believe that it can be), the termination of that agreement would not *per se* render the case moot.

It is well settled that the mere discontinuance of illegal practices, particularly after suit has been filed, does not preclude the issuance of an injunction against their resumption. *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.,* 304 U. S. 258; *Hecht Co.* v. *Bowles,* 321 U. S. 321. Even if the contract had terminated, "The issue as to whether future violations should be enjoined was still before the Court and was by no means moot." *Porter* v. *Lee,* 328 U. S. 246, 252. Whether an injunction should issue in such circumstances depends upon whether there is any "reasonable expectation that the wrong will be repeated." *United States* v. *Aluminum Company of America,* 148 F. 2d 416, 448 (C. A. 2).

We submit that the evidence before the district court cannot support an inference that there is no probability of resumption of the illegal practices by these defendants. In addition to the evidence

(discussed *supra*) which showed that defendants' intention in formulating the crop destruction program was to deal with a recurring, not an isolated, problem, there is the compelling fact that the defendants refused to state that they would not resume the practices. On the contrary, their counsel told the court that:

> We come from that to this talk about likelihood and the like. They talk about my having said that we don't intend to repeat this in the future. As a matter of fact, I have never said that. There is no part of the record which will support it, and I don't say it now. I will go further. I won't even attempt to say what a group of 225 farmers might or might not do in the future (Tr. Aug. 13, part 1, pp. 64–65).

Conceivably, the district court's conclusion that the case was moot may have been influenced by the fact that there had been no discing-up of lettuce since the complaint was filed (Cf. Tr. of June 30, p. 23). But this was not the result of any voluntary abandonment of defendants' practices. On the contrary, defendants stopped discing-up only when commanded to do so by court order, and still maintain that the practice was not illegal.[10] While voluntary cessation of the illegal

[10] Defendants' counsel told the court: "No, we never admitted that we shouldn't have made it [the agreement], we still think we should have made it * * * No, we don't admit this contract was wrong or that the injunctions were right, but we are saying that in view of the injunction we stopped it * * *" (Tr. of June 30, pp. 24–25).

practices before suit may, in some circumstances, indicate the unlikelihood of their repetition, termination pursuant to court decree certainly carries no such implication. Rather, it suggests that it is only the hand of the court that stays the illegal practices, and that their resumption is likely if the injunction is dissolved. This case is thus markedly different from the *Hamburg-American* case, *supra,* where resumption of the illegal practices was precluded by events beyond the voluntary control of the defendants (239 U. S. at 477).

The question of whether an injunction against repetition of illegal practices can be blocked by discontinuing such practices after the Government has filed suit and in compliance with a preliminary injunction is important in the administration, not only of the Sherman Act, but of a large number of regulatory statutes where preliminary injunctions are utilized as an enforcement technique.

For the foregoing reasons, we believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

OCTOBER 10, 1952.

Filed October 13, 1952.

C. W. CALBREATH, *Clerk.*

APPENDIX

In the United States District Court, for the Northern District of California, Southern Division

No. 30561

UNITED STATES OF AMERICA, PLAINTIFF

v.

GROWER-SHIPPER VEGETABLE ASSOCIATION OF CENTRAL CALIFORNIA, ET AL., DEFENDANTS

ORDER GRANTING MOTION TO DISMISS

The motion of certain "named defendants" to dismiss the cause because of mootness is granted, "without prejudice to the right of the government in the future to assail any actual contract or combination deemed to offend against the Anti-Trust Act." *United States* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466, at 478.

Dated: August 14, 1952.

LOUIS E. GOODMAN,
United States District Judge.

Filed August 14, 1952.

C. W. CALBREATH, *Clerk.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 461

THE UNITED STATES OF AMERICA,
Appellant,

vs.

GROWER-SHIPPER VEGETABLE ASSOCIATION OF CENTRAL CALIFORNIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION

GEORGE M. NAUS,
Counsel for Appellees.

SIDNEY L. CHURCH,
Of Counsel.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 30561

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GROWER-SHIPPER VEGETABLE ASSOCIATION OF CENTRAL CALIFORNIA, ET AL.,

Defendants

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION

Those appellees in the above entitled cause who are named in the caption of the Complaint (as distinguished from those who came in separately later as members of a class) for a statement in opposition to appellant's statement as to jurisdiction herein, respectfully show the following:

Opinion Below

The Court below took our motion to dismiss under submission after a day of oral argument, and on the following day filed an order reading:

> The motion of certain "named defendants" to dismiss the cause because of mootness is granted, "without

> prejudice to the right of the government in the future to assail any actual contract or combination deemed to offend against the Anti-Trust Act." United States v. Hamburg-Amerikanische Co., 239 U. S. 466, at 478.

In colloquy during the course of the oral argument the court below stated these oral opinions:[1]

Mr. Howland: I will be happy to have Your Honor's views.

The Court: It would seem to me that there was before the Court in this action that was brought by the Government the objective of invoking the equitable arm of the Court to stop the carrying out of an agreement that was alleged to be in contravention to the Statute. Injunction was issued to prevent that specific agreement from being carried out. That agreement by its terms was at an end. It was not an agreement such as we have in what might be called the orthodox antitrust case wherein manufacturers or producers or distributors agree as to the fixing of prices or making other arrangements to contain a market in violation of the objectives of the antitrust statutes, but it was a case where at a certain time and under certain conditions, to remedy some evil that a large number of growers felt was upon them, caused them to enter into an agreement that was proscribed by the antitrust laws, and you stopped that in this litigation.

Now what is the Court going to prevent, that having been stopped and that agreement by its own terms, not because of any voluntary act or self-serving declaration of the parties to it, being at an end, but because by its own terms it ended, and the only way another contract along those same lines could be made was by hundreds of these people getting together again and making a new contract. Now who can

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[1] Reporter's Transcript, Hearing on August 13, 1952, pp. 75-78; 83-84; 85-86.

tell what the conditions would be under which some new contract that they might conceivably enter into in the future, what conditions might exist at that time? Who knows what the weather conditions are going to be, what the soil conditions are going to be, what the market conditions are going to be, what the thousand and one speculative things, things that we have to speculate about might exist at the time? How is this Court going to lay down in this case a rule that everybody engaged in this business, all the growers, are going to have to subscribe to in the future under penalty of contempt proceedings?

The Government is not helpless. It has a very strong arm here, which you represent, and it can come in at any time if there is a law that is being violated or which is threatened to be violated and get its relief from the Court. I just don't see any purpose in the desire to get on a trial a permanent injunction for the restraint in the future of the parties to an agreement which by its very terms has expired and cannot be revived except by a new agreement of some kind which all of these people have to enter into, depending upon what the conditions are at the time.

Now maybe the next occasion that—assuming they want to enter into an illegal agreement some time in the future—maybe it will only affect one county the next time. It may not affect all of the people. It may not affect all of the lettuce. It may not be the time of the year when it is necessary to do these things. So that to now lay down a general —to now issue a permanent injunction restraining—what? —the the execution of a precisely similar contract as this? How do we know that anybody—what evidence do we have that anybody in the future is going to enter into precisely that kind of a contract? We don't know that. There is no evidence to that effect. We don't know. We don't even

know whether these people are going to be growing lettuce a year from now.

And I am very much impressed, enthusiastic as I may be with respect to the enforcement of the spirit of the antitrust laws, by Mr. Naus' argument that people shouldn't in the contractual field be in a position where they have to come to the Antitrust Division in order to make a contract so as to be sure they won't be hauled into Court on contempt proceedings and justify any contract that they may make before this department of the Government. That, I think, is not the sort of thing that equity should compel. That may be for your elected representatives to determine in Washington or for the Congress to determine, but I don't think it is for the Court, exercising the power of equity, to decide that. * * *

* * * * *

The Court: * * * The only possible question there has ever been in the matter, and I have listened to a long argument on whether it is proper before the Court on a question to dismiss, that is all, but there hasn't been anything presented to the Court that indicates in the slightest degree that there is any likelihood of any defendant in this case violating the statute on the basis of what has transpired so far. You have been here in this Court since April of 1951. Now, what is there to indicate there is anything that equity need here [hear] that would make it advisable to issue a permanent injunction on the ground that there is any likelihood of anything being done not heretofore being presented?

Mr. Howland: From my point of view, Your Honor, taking the view that I do of this allegation, I don't think that we have the question here whether or not there is

going to be a repetition of something that was done in the past. I think the question is whether or not the Court is going to enjoin something that is continuing and which exists today. We are advised that this Lettuce Growers' Committee is still in existence. We are advised that they have——

The Court: What is wrong about that? We haven't gone so far that we don't allow people to meet together and discuss their problems and that sort of thing. We are not regimenting them to that extent. We only come in here and use the arm of equity when someone does something that is wrong.

* * * * *

The Court: They may find some way to do this that is not repugnant to the statute. They may find some way of handling their affairs that is not repugnant to the statute. The Court isn't going to supervise them. It is time enough for the Court to act when there is some judiciable controversy, something to act against.

Mr. Howland: I must say, with all deference, under the view that Your Honor has under these matters, where a preliminary injunction has been issued and where the hand of law violation has been stayed by Court order, it is impossible under those circumstances——

The Court: Oh, no, you are not justified in drawing that inference from what I have said, because there are innumerable cases in which a preliminary injunction is followed by a final injunction in antitrust cases and in many others. I have issued them many times myself. That isn't what I am saying at all. The whole cause of action here only operated with respect to a particular point in place of time and parties and having acted there is nothing more equity can do in that regard * * *

The Questions Involved Are Not Substantial

Appellant's false premise under its heading "The Questions are Substantial" is planted in the first sentence thereunder—that the view of the court below was "that the Government's case related solely to the crop destruction contracts [contract] covering the [first of two crops of] 1951 season * * *." Continuing, the appellant seeks to narrow the matter further by seeking to make it appear that only an interpretation or construction of pleading allegations was ruled.

The ruling below did not turn on a question of pleading. The complaint was filed on May 18, 1951, an ex parte restraining order was issued forthwith, and seven days later, on May 25, 1951, there was a full hearing on the plaintiff's application for a preliminary injunction, and affidavits, exhibits and extended oral testimony were received, and a preliminary injunction issued. Numerous exhibits were received from both sides, and the shorthand reporter's transcript contains 103 pages. In substance, the following appears: There are in the three-county farming area involved about 400 growers of lettuce, of whom about 60 (known as grower-shippers) pack and ship the lettuce in carloads destined for points throughout the United States. In the area two crops of lettuce are grown each year, a spring crop and a fall crop, with shipping of the spring crop beginning in April. During April 1951 an estimated 27,022 acres was approaching harvest time. If harvested and shipped in a volume exceeding 400 carloads a day the market price would collapse. A volume of 450 carloads daily was in sight. By April 23, 1951, the agreement [2]

[2] Exhibit 1 of the Complaint.

involved had been signed on behalf of 23,286 acres, or 86% of the whole. It was limited in time by its terms, as follows:

> *Term of the Plan*
>
> 1. This plan shall apply to all lettuce planted prior to April 1, 1951, and which is harvested prior to June 16, 1951. The committee elected as hereinafter provided shall have the right to extend the term for a period not to exceed ten days beyond June 16, 1951.
>
> 2. A new sign-up shall be necessary to extend the period beyond June 16, 1951, or beyond June 26, 1951, if said plan is extended by the committee as heretofore provided.

Crop destruction by the agreed discing commenced on May 14, 1951, and was stopped four days later by the restraining order on the day the complaint was filed—appellees read press reports of the order and stopped the discing, without service of the order. On May 25, 1951, when the preliminary injunction issued, the term of the agreement had a remaining period of 32 days of life upon which the preliminary injunction could and did operate.

More than a year later appellant initiated steps for a pre-trial conference and to set the case for trial on final hearing. We opposed with a motion to dismiss for mootness, and following a hearing on August 13, 1952, our motion was granted. At the hearing all that had occurred before in the action was before the court below—all the evidence and facts, and not merely a pleading construction or interpretation. It was in that hearing context, and at the conclusion, that the court below delivered the oral opinions quoted supra.

The question attempted to be presented by appellant in this appeal has been so definitely determined under the anti-trust statutes by the Hamburg-American case[3] that no

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[3] *U. S.* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466.

substantial question is presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States.

There, an agreement among ocean carriers allotted steerage traffic by percentages. The agreement had a life expiring in December 1915. On an appeal by the United States from a decree denying it an injunction judicial notice was taken that an existing state of war had terminated the agreement, thereby leaving the injunction suit with "an absolute want of present actuality". 239 U. S. at 475. The appellant contended, however, that "in view of the character of the questions and the possibility or probability that, on the cessation of war, the parties will resume or recreate their asserted illegal combination, we should now decide the controversies in order that by operation of the rule to be established any attempt at renewal of or creation of the combination in the future will be rendered impossible." 239 U. S. at 475. The contention was adversely ruled because it was based merely "upon a prophecy as to future conditions" and not upon an actual and existing controversy in the particular case before the Court—it would not give an advisory opinion upon a question of law for the government of future cases. 239 U. S. at 475. The case was remanded "with directions to dismiss the bill without prejudice to the right of the government in the future to assail any actual contract or combination deemed to offend against the anti-trust act." 239 U. S. at 478. The judgment from which appellant attempts an appeal in the case at bar is laid precisely on that precedent —it reads:

> (1) That the cause herein be dismissed without prejudice to the right of plaintiff in the future to assail any actual contract or combination deemed to offend against the antitrust laws; * * *.

Here, an agreement among farmers expired by its terms not later than June 26, 1951. In the interim of more than a year before dismissal for mootness on August 14, 1952, there were three more crops of lettuce—fall of 1951 and spring and fall of 1952—with no new agreement among the farmers. At the hearing, the court below pointed out that there was an absence of evidence of any probability of recurrence of agreement. A court of equity should not grant an injunction "where there is no evidence that the offense is likely to be repeated in the future." *Walling* v. *T. Buettner & Co.,* 133 F. 2d 306, 308. The distinction of the cases cited in appellant's Statement is that in each there was a factual basis for a reasonable inference of probable repetition in the future. The burden is not on appellees to show no possibility or likelihood of recurrence—the burden is on a plaintiff who seeks an injunction to show a reasonable probability of recurrence of the past act. Moreover, the decree is not an estoppel or bar but expressly saves to appellant the right to come to court again if in the future there are actual facts of an actual recurrence.

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